



## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR Part 1

[REG-109348-22]

RIN 1545-BQ69

#### Identification of Monetized Installment Sale Transactions as Listed Transactions

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice of proposed rulemaking and notice of public hearing.

**SUMMARY:** This document contains proposed regulations that would identify monetized installment sale transactions and substantially similar transactions as listed transactions, a type of reportable transaction. Material advisors and participants in these listed transactions would be required to file disclosures with the IRS and would be subject to penalties for failure to disclose. The proposed regulations would affect participants in those transactions as well as material advisors. This document also provides a notice of a public hearing on the proposed regulations.

**DATES:** *Comments:* Electronic or written comments must be received by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

*Public Hearing:* The public hearing is scheduled to be held on October 12, 2023, at 10:00 a.m. ET. Pursuant to Announcement 2023-16, 2023-20 I.R.B. 854 (May 15, 2023), the public hearing is scheduled to be conducted in person, but the IRS will provide a telephonic option for individuals who wish to attend or testify at the hearing by telephone. Requests to speak and outlines of topics to be discussed at the public hearing must be received by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**. If no outlines are received by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL***

**REGISTER]**, the public hearing will be cancelled. Requests to attend the public hearing must be received by 5:00 p.m. ET on October 10, 2023. The hearing will be made accessible to people with disabilities. Requests for special assistance during the hearing must be received by 5:00 p.m. ET on October 6, 2023.

**ADDRESSES:** Commenters are strongly encouraged to submit public comments electronically. Submit electronic submissions via the Federal eRulemaking Portal at <https://www.regulations.gov> (indicate IRS and REG-109348-22) by following the online instructions for submitting comments. Requests for a public hearing must be submitted as prescribed in the “Comments and Requests for a Public Hearing” section. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The Department of the Treasury (Treasury Department) and the IRS will publish for public availability any comments to the IRS’s public docket. Send paper submissions to: CC:PA:LPD:PR (REG-109348-22), room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, D.C. 20044.

**FOR FURTHER INFORMATION CONTACT:** Concerning the proposed regulations, Jonathan A. Dunlap of the Office of Associate Chief Counsel (Income Tax and Accounting), (202) 317-4718 (not a toll-free number); concerning submissions of comments and requests for hearing, Vivian Hayes at (202) 317-5306 (not a toll-free number) or [publichearings@irs.gov](mailto:publichearings@irs.gov) (preferred).

## **SUPPLEMENTARY INFORMATION:**

### **Background**

This document contains proposed additions to 26 CFR part 1 (Income Tax Regulations) under section 6011 of the Internal Revenue Code (Code). The additions identify certain transactions as “listed transactions” for purposes of section 6011.

### **I. Disclosure of Reportable Transactions by Participants and Penalties for Failure to Disclose**

Section 6011(a) generally provides that, when required by regulations prescribed

by the Secretary of the Treasury or her delegate (Secretary), “any person made liable for any tax imposed by this title, or with respect to the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary. Every person required to make a return or statement shall include therein the information required by such forms or regulations.”

Section 1.6011-4(a) provides that every taxpayer that has participated in a reportable transaction within the meaning of §1.6011-4(b) and who is required to file a tax return must file a disclosure statement within the time prescribed in §1.6011-4(e). Reportable transactions are identified in §1.6011-4 and include listed transactions, confidential transactions, transactions with contractual protection, loss transactions, and transactions of interest. See §1.6011-4(b)(2) through (6). Section 1.6011-4(b)(2) defines a listed transaction as a transaction that is the same as or substantially similar to one of the types of transactions that the IRS has determined to be a tax avoidance transaction and identified by notice, regulation, or other form of published guidance as a listed transaction.

Section 1.6011-4(c)(4) provides that a transaction is “substantially similar” if it is expected to obtain the same or similar types of tax consequences and is either factually similar or based on the same or similar tax strategy. Receipt of an opinion regarding the tax consequences of the transaction is not relevant to the determination of whether the transaction is the same as or substantially similar to another transaction. Further, the term substantially similar must be broadly construed in favor of disclosure. For example, a transaction may be substantially similar to a listed transaction even though it may involve different entities or use different Code provisions.

Section 1.6011-4(c)(3)(i)(A) provides that a taxpayer has participated in a listed transaction if the taxpayer’s tax return reflects tax consequences or a tax strategy described in the published guidance that lists the transaction under §1.6011-4(b)(2).

Published guidance may identify other types or classes of persons that will be treated as participants in a listed transaction. Published guidance may also identify types or classes of persons that will not be treated as participants in a listed transaction.

Section 1.6011-4(d) and (e) provide that the disclosure statement Form 8886, *Reportable Transaction Disclosure Statement* (or successor form) must be attached to the taxpayer's tax return for each taxable year for which a taxpayer participates in a reportable transaction. A copy of the disclosure statement must be sent to the IRS's Office of Tax Shelter Analysis (OTSA) at the same time that any disclosure statement is first filed by the taxpayer pertaining to a particular reportable transaction.

Section 1.6011-4(e)(2)(i) provides that if a transaction becomes a listed transaction after the filing of a taxpayer's tax return reflecting the taxpayer's participation in the listed transaction and before the end of the period of limitations for assessment for any taxable year in which the taxpayer participated in the listed transaction, then a disclosure statement must be filed with OTSA within 90 calendar days after the date on which the transaction becomes a listed transaction. This requirement extends to an amended return and exists regardless of whether the taxpayer participated in the transaction in the year the transaction became a listed transaction. The Commissioner of Internal Revenue (Commissioner) may also determine the time for disclosure of listed transactions in the published guidance identifying the transaction.

Participants required to disclose these transactions under §1.6011-4 who fail to do so are subject to penalties under section 6707A. Section 6707A(b) provides that the amount of the penalty is 75 percent of the decrease in tax shown on the return as a result of the reportable transaction (or which would have resulted from such transaction if such transaction were respected for Federal tax purposes), subject to minimum and maximum penalty amounts. The minimum penalty amount is \$5,000 in the case of a natural person and \$10,000 in any other case. For a listed transaction, the maximum

penalty amount is \$100,000 in the case of a natural person and \$200,000 in any other case.

Additional penalties may also apply. In general, section 6662A imposes a 20 percent accuracy-related penalty on any understatement (as defined in section 6662A(b)(1)) attributable to an adequately disclosed reportable transaction. If the taxpayer had a requirement to disclose participation in the reportable transaction but did not adequately disclose the transaction in accordance with the regulations under section 6011, the taxpayer is subject to an increased penalty rate equal to 30 percent of the understatement. See section 6662A(c). Section 6662A(b)(2) provides that section 6662A applies to any item which is attributable to any listed transaction and any reportable transaction (other than a listed transaction) if a significant purpose of such transaction is the avoidance or evasion of Federal income tax.

Participants required to disclose listed transactions who fail to do so are also subject to an extended period of limitations under section 6501(c)(10). That section provides that the time for assessment of any tax with respect to the transaction shall not expire before the date that is one year after the earlier of the date the participant discloses the transaction or the date a material advisor discloses the participation pursuant to a written request under section 6112(b)(1)(A).

## II. Disclosure of Reportable Transactions by Material Advisors and Penalties for Failure to Disclose

Section 6111(a) provides that each material advisor with respect to any reportable transaction shall make a return setting forth: (1) information identifying and describing the transaction, (2) information describing any potential tax benefits expected to result from the transaction, and (3) such other information as the Secretary may prescribe. Such return shall be filed not later than the date specified by the Secretary.

Section 301.6111-3(a) of the Procedure and Administration Regulations provides that each material advisor with respect to any reportable transaction, as defined in

§1.6011-4(b), must file a return as described in §301.6111-3(d) by the date described in §301.6111-3(e).

Section 301.6111-3(b)(1) provides that a person is a material advisor with respect to a transaction if the person provides any material aid, assistance, or advice with respect to organizing, managing, promoting, selling, implementing, insuring, or carrying out any reportable transaction, and directly or indirectly derives gross income in excess of the threshold amount as defined in §301.6111-3(b)(3) for the material aid, assistance, or advice. Under §301.6111-3(b)(2)(i) and (ii), a person provides material aid, assistance, or advice if the person provides a tax statement, which is any statement (including another person's statement), oral or written, that relates to a tax aspect of a transaction that causes the transaction to be a reportable transaction as defined in §1.6011-4(b)(2) through (7).

Material advisors must disclose transactions on Form 8918, *Material Advisor Disclosure Statement* (or successor form), as provided in §301.6111-3(d) and (e). Section 301.6111-3(e) provides that the material advisor's disclosure statement for a reportable transaction must be filed with the OTSA by the last day of the month that follows the end of the calendar quarter in which the advisor becomes a material advisor with respect to a reportable transaction or in which the circumstances necessitating an amended disclosure statement occur. The disclosure statement must be sent to the OTSA at the address provided in the instructions for Form 8918 (or successor form).

Section 301.6111-3(d)(2) provides that the IRS will issue to a material advisor a reportable transaction number with respect to the disclosed reportable transaction. Receipt of a reportable transaction number does not indicate that the disclosure statement is complete, nor does it indicate that the transaction has been reviewed, examined, or approved by the IRS. Material advisors must provide the reportable transaction number to all taxpayers and material advisors for whom the

material advisor acts as a material advisor as defined in §301.6111-3(b). The reportable transaction number must be provided at the time the transaction is entered into, or, if the transaction is entered into prior to the material advisor receiving the reportable transaction number, within 60 calendar days from the date the reportable transaction number is mailed to the material advisor.

Section 6707(a) provides that a material advisor who fails to file a timely disclosure, or files an incomplete or false disclosure statement, is subject to a penalty. Pursuant to section 6707(b)(2), for listed transactions, the penalty is the greater of (1) \$200,000, or (2) 50 percent of the gross income derived by such person with respect to aid, assistance, or advice which is provided with respect to the listed transaction before the date the return is filed under section 6111.

Additionally, section 6112(a) provides that each material advisor with respect to any reportable transaction shall (whether or not required to file a return under section 6111 with respect to such transaction) maintain a list (1) identifying each person with respect to whom such advisor acted as a material advisor with respect to such transaction and (2) containing such other information as the Secretary may by regulations require. Material advisors must furnish such lists to the IRS in accordance with §301.6112-1(e).

A material advisor may be subject to a penalty under section 6708 for failing to maintain a list under section 6112(a) and failing to make the list available upon written request to the Secretary in accordance with section 6112(b) within 20 business days after the date of such request. Section 6708(a) provides that the penalty is \$10,000 per day for each day of the failure after the 20th day. However, no penalty will be imposed with respect to the failure on any day if such failure is due to reasonable cause.

### III. Installment Sales

Section 61(a)(3) provides that a taxpayer's gross income includes gains from

dealings in property. Under section 1001(a), a taxpayer's gain on a sale of property is equal to the excess of the amount realized on the sale over the taxpayer's adjusted basis in the property and, generally, a taxpayer must recognize the gain in the taxable year of the sale. The taxpayer's amount realized generally includes cash actually or constructively received, plus the fair market value of any property received or, in the case of a debt instrument issued in exchange for property, the issue price of the debt instrument. See §1.1001-1 of the Income Tax Regulations.

Section 453 provides an exception to the general rule that gain from the sale of property must be recognized in the year of sale. Section 453(a) provides, in general, that income from an installment sale is accounted for under the installment method. Under section 453(b), an installment sale is one in which a taxpayer disposes of property and at least one payment is to be received after the close of the taxable year of the disposition. The installment method, as described in section 453(c), requires a taxpayer to recognize income from a disposition as payments are actually or constructively received, in an amount equal to the proportion of the payment received that the gross profit (realized or to be realized when payment is completed) bears to the total contract price.

Under section 453(f)(3) and 26 CFR §15a.453-1(b)(3) (Temporary Income Tax Regulations Under the Installment Sales Revision Act), a taxpayer generally does not receive a "payment," as such term is used in section 453(b), to the extent the taxpayer receives evidence of indebtedness "of the person acquiring the property" (installment obligation). As a result, notwithstanding that a taxpayer has received an installment obligation from the buyer evidencing the buyer's obligation to pay an amount equal to the purchase price, the taxpayer is not treated as having received full payment in the year in which the taxpayer received the installment obligation. Instead, the taxpayer is treated as receiving payments when the taxpayer receives (or constructively receives)



payments under the installment obligation.

However, to the extent that the taxpayer receives a note or other evidence of indebtedness in the year of sale from a person other than “the person acquiring the property,” section 453(f)(3) is inapplicable. A note or other evidence of indebtedness received in the year of sale issued by a person other than the person acquiring the property is, under §15a.453-1(b)(3), the receipt of a payment for purposes of section 453. Likewise, under §15a.453-1(b)(3), the taxpayer’s receipt of a note or other evidence of indebtedness that is secured directly or indirectly by cash or a cash equivalent is treated as the receipt of payment for purposes of section 453.

Section 453A(d) provides rules relating to certain installment obligations arising from a disposition of property, the sales price of which is more than \$150,000. Under section 453A(d), if any indebtedness is secured by an installment obligation to which section 453A applies, the net proceeds of the secured indebtedness are treated as a payment received on the installment obligation as of the later of the time the indebtedness becomes secured by the installment obligation or the time the taxpayer receives the proceeds of the indebtedness (the pledging rule). To the extent installment payments are received after the date payment is treated as received under section 453A(d), the tax on such payments is treated as having already been paid.

#### IV. Tax Avoidance Using Monetized Installment Sales

The Treasury Department and the IRS are aware that promoters are marketing transactions that purport to convert a cash sale of appreciated property by a taxpayer (seller) to an identified buyer (buyer) into an installment sale to an intermediary (who may be the promoter) followed by a sale from the intermediary to the buyer. In a typical transaction, the intermediary issues a note or other evidence of indebtedness to the seller requiring annual interest payments and a balloon payment of principal at the maturity of the note, and then immediately or shortly thereafter, the intermediary

transfers the seller's property to the buyer in a purported sale of the property for cash, completing the prearranged sale of the property by seller to buyer. In connection with the transaction, the promoter refers the seller to a third party that enters into a purported loan agreement with the seller. The intermediary generally transfers the amount it has received from the buyer, less certain fees, to an account held by or for the benefit of this third party (the account). The third party provides a purported non-recourse loan to the seller in an amount equal to the amount the seller would have received from the buyer for the sale of the property, less certain fees. The "loan" is either funded or collateralized by the amount deposited into the account. The seller's obligation to make payments on the purported loan is typically limited to the amount to be received by the seller from the intermediary pursuant to the purported installment obligation. Upon maturity of the purported installment obligation, the purported loan, and the funding note, the offsetting instruments each terminate, giving rise to a deemed payment on the purported installment obligation and triggering taxable gain to the seller purportedly deferred until that time.

The promotional materials for these transactions assert that engaging in the transaction will allow the seller to defer the gain on the sale of the property under section 453 until the taxpayer receives the balloon principal payment in the year the note matures, even though the seller receives cash from the purported lender in an amount that approximates the amount paid by the buyer to the intermediary. The IRS intends to use multiple arguments to challenge the reported treatment of these transactions as installment sales to which section 453 purportedly applies, including the arguments described below.

First, the intermediary is not a bona fide purchaser of the gain property that is the subject of the purported installment sale. In these transactions, the intermediary is interposed between the seller and the buyer for no purpose other than Federal income

tax avoidance, and the intermediary neither enjoys the benefits nor bears the burdens of ownership of the gain property. The interposition of the intermediary typically takes place after the seller has decided to sell the gain property to a specific buyer at a specific negotiated purchase price, and the purported resale by the intermediary to such buyer generally takes place almost simultaneously with the purported sale to the intermediary for approximately the same negotiated purchase price, less certain fees. The seller's only purpose for entering into an agreement with the intermediary is to defer recognition of the gain on the sale of the gain property to the buyer. Other than the Federal income tax deferral benefits provided by the installment method provisions of section 453, the sole economic effect of entering the monetized installment sale transaction from the perspective of the seller is to pay direct and indirect fees to the intermediary and the purported lender in an amount that is substantially less than the Federal tax savings purportedly achieved from using section 453 to defer the realized gain on the sale.

When an intermediate transaction with a third party is interposed and lacks independent substantive (non-tax) purpose, such transaction is not respected for Federal income tax purposes and the transaction is appropriately treated as a sale of the property by the seller directly to the buyer in the taxable year in which the gain property is transferred by the seller. See *Commissioner v. Court Holding Co.*, 324 U.S. 331, 334 (1945) ("A sale by one person cannot be transformed for tax purposes into a sale by another by using the latter as a conduit through which to pass title. To permit the true nature of a transaction to be disguised by mere formalisms, which exist solely to alter tax liabilities, would seriously impair the effective administration of the tax policies of Congress" (footnote omitted)); *Wrenn v. Commissioner*, 67 T.C. 576 (1976), (holding that a taxpayer did not engage in a bona fide installment sale when the taxpayer transferred stock to his spouse under a purported installment sale contract,

followed by the spouse immediately selling the stock to a third party for a negligible gain); *Blueberry Land Co. v. Commissioner*, 361 F.2d 93, 100 (5th Cir. 1966), (holding that a corporation's transaction with an unrelated intermediary entered into solely to avoid Federal income taxes on the sale should be disregarded for Federal income tax purposes and the corporation should be taxed as if it sold the property directly to the ultimate buyer); *Enbridge Energy Co. Inc. v. United States*, 354 F. App'x 15 (5th Cir. 2009) (holding that an intermediate sale was a sham, the intermediary lacked a "bona fide role in the transaction," as its only purpose for being a party in the transaction, and indeed for existing, was to mitigate the Federal tax bill arising from the transaction, and that the transaction should be treated, for Federal tax purposes, as a sale directly from the seller to the taxpayer).

In addition, it is inappropriate to treat the intermediary in the monetized installment sale transaction described in this NPRM as the acquirer of the gain property that is the subject of the purported installment sale because the intermediary neither enjoys the benefits nor bears the burdens of ownership of the gain property that a person must possess to be considered the owner of property for Federal income tax purposes. See *Grodt & McKay Realty Inc. v. Commissioner*, 77 T.C. 1221 (1981). See also *Derr v. Commissioner*, 77 T.C. 708 (1981) and *Baird v. Commissioner*, 68 T.C. 115 (1977).

Second, in these transactions the seller is appropriately treated as having already received the full payment at the time of the sale to the buyer because (1) the purported installment obligation received by the seller is treated as the receipt of a payment by the seller under §15a.453-1(b)(3) since it is indirectly secured by the sales proceeds, or (2) the proceeds of the purported loan are appropriately treated as a payment to the seller because the purported loan is not a bona fide loan for Federal income tax purposes, or (3) the pledging rule of section 453A(d) deems the seller to

receive full payment on the purported installment obligation in the year the seller receives the loan proceeds.

Third, the transaction may be disregarded or recharacterized under the economic substance rules codified under section 7701(o) or the substance over form doctrine. The step transaction doctrine and conduit theory may also apply to recharacterize monetized installment sale transactions described in this NPRM.

#### V. Purpose of Proposed Regulations

On March 3, 2022, the Sixth Circuit issued an order in Mann Construction v. United States, 27 F.4th 1138, 1147 (6th Cir. 2022), holding that Notice 2007-83, 2007-2 C.B. 960, which identified certain trust arrangements claiming to be welfare benefit funds and involving cash value life insurance policies as listed transactions, violated the Administrative Procedure Act (APA), 5 U.S.C. 551-559, because the notice was issued without following the notice-and-comment procedures required by section 553 of the APA. The Sixth Circuit reversed the decision of the district court, which held that Congress had authorized the IRS to identify listed transactions without notice and comment. See Mann Construction, Inc. v. United States, 539 F.Supp.3d 745, 763 (E.D. Mich. 2021).

Relying on the Sixth Circuit's analysis in Mann Construction, three district courts and the Tax Court have concluded that IRS notices identifying listed transactions were improperly issued because they were issued without following the APA's notice and comment procedures. See Green Rock, LLC v. IRS, 2023 WL 1478444 (N.D. AL., February 2, 2023) (Notice 2017-10); GBX Associates, LLC, v. United States, 1:22cv401 (N.D. Ohio, Nov. 14, 2022) (same); Green Valley Investors, LLC, et al. v. Commissioner, 159 T.C. No. 5 (Nov. 9, 2022) (same); see also CIC Services, LLC v. IRS, 2022 WL 985619 (E.D. Tenn. March 21, 2022), as modified by 2022 WL 2078036 (E.D. Tenn. June 2, 2022) (Notice 2016-66, identifying a transaction of interest).

The Treasury Department and the IRS disagree with the Sixth Circuit's decision in Mann Construction and the subsequent decisions that have applied that reasoning to find other IRS notices invalid and are continuing to defend the validity of notices identifying transactions as listed transactions in circuits other than the Sixth Circuit. At the same time, however, to avoid any confusion and ensure consistent enforcement of the tax laws throughout the nation, the Treasury Department and the IRS are issuing these proposed regulations to identify monetized installment sale transactions as listed transactions for purposes of all relevant provisions of the Code and Treasury Regulations.

## **Explanation of Provisions**

These proposed regulations would require taxpayers that participate in monetized installment sale transactions and substantially similar transactions, and persons who act as material advisors with respect to these transactions, to disclose the transactions in accordance with the regulations issued under sections 6011 and 6111. Material advisors would also be required to maintain lists as required by section 6112.

### **I. Definition of Monetized Installment Sale Transaction**

Proposed §1.6011-13(a) would provide that a transaction that is the same as, or substantially similar to, a monetized installment sale transaction described in proposed §1.6011-13(b) is a listed transaction for purposes of §1.6011-4(b)(2) and sections 6111 and 6112. “Substantially similar” is defined in §1.6011-4(c)(4) to include any transaction that is expected to obtain the same or similar types of tax consequences and that is either factually similar or based on the same or a similar tax strategy.

The transaction described in proposed §1.6011-13(b) includes the following elements:

(1) A taxpayer (seller), or a person acting on the seller's behalf, identifies a potential buyer for appreciated property (gain property), who is willing to purchase the

gain property for cash or other property (buyer cash).

(2) The seller enters into an agreement to sell the gain property to a person other than the buyer (intermediary) in exchange for an installment obligation.

(3) The seller purportedly transfers the gain property to the intermediary, although the intermediary either never takes title to the gain property or takes title only briefly before transferring it to the buyer.

(4) The intermediary purportedly transfers the gain property to the buyer in a sale of the gain property in exchange for the buyer cash.

(5) The seller obtains a loan, the terms of which are such that the amount of the intermediary's purported interest payments on the installment obligation correspond to the amount of the seller's purported interest payments on the loan during the period.

On each of the installment obligation and loan, only interest is due over identical periods, with balloon payments of all or a substantial portion of principal due at or near the end of the instruments' terms.

(6) The sales proceeds from the buyer received by the intermediary, reduced by certain fees (including an amount set aside to fund purported interest payments on the purported installment obligation), are provided to the purported lender to fund the purported loan to the seller or transferred to an escrow or investment account of which the purported lender is a beneficiary. The lender agrees to repay these amounts to the intermediary over the course of the term of the installment obligation.

(7) On the seller's Federal income tax return for the taxable year of the purported installment sale, the seller treats the purported installment sale as an installment sale under section 453.

A transaction may be "substantially similar" to the transaction described above even if such transaction does not include all of the elements described above. For example, a transaction would be substantially similar to a monetized installment sale if a

seller transfers property to an intermediary for an installment obligation, the intermediary simultaneously or after a brief period transfers the property to a previously identified buyer for cash or other property, and in connection with the transaction, the seller receives a loan for which the cash or property from the buyer serves indirectly as collateral.

## II. Participation

Whether a taxpayer has participated in the listed transaction described in proposed §1.6011-13(b) would be determined under §1.6011-4(c)(3)(i)(A). Participants would include the seller, the intermediary, the purported lender, and any other person whose Federal income tax return reflects tax consequences or the tax strategy described in proposed §1.6011-13(b), or a substantially similar transaction.

Under the proposed regulations, the buyer of the gain property that provides the buyer cash or other consideration would not be treated as a participant in the listed transaction described in proposed §1.6011-13(b) under §1.6011-4(c)(3)(i)(A). The Treasury Department and the IRS request comments on whether the buyer of the gain property should be treated as a participant given the buyer's key role in the transaction. If the final regulations include the buyer as a participant, that change would apply only with respect to transactions entered into after the date on which the final regulations are published in the *Federal Register*.

## III. Material Advisors

Material advisors who make a tax statement with respect to monetized installment sale transactions described in proposed §1.6011-13(b) would have disclosure and list maintenance obligations under sections 6111 and 6112. See §§301.6111-3 and 301.6112-1.

## IV. Effect of Transaction Becoming a Listed Transaction



Participants required to disclose listed transactions under §1.6011-4 who fail to do so are subject to penalties under section 6707A. Participants required to disclose listed transactions under §1.6011-4 who fail to do so are also subject to an extended period of limitations under section 6501(c)(10). Material advisors required to disclose listed transactions under section 6111 who fail to do so are subject to penalties under section 6707. Material advisors required to maintain lists of investors under section 6112 who fail to do so (or who fail to provide such lists when requested by the IRS) are subject to penalties under section 6708. In addition, the IRS may impose other penalties on persons involved in listed transactions, including accuracy-related penalties under section 6662 or section 6662A, the section 6694 penalty for understatements of a taxpayer's liability by a tax return preparer, the section 6700 penalty for promoting abusive tax shelters, and the section 6701 penalty for aiding and abetting understatement of tax liability.

The Treasury Department and IRS recognize that some taxpayers may have filed Federal income tax returns taking the position that they were entitled to the purported tax benefits of the type of transactions described in these proposed regulations. Because the IRS will take the position in litigation that taxpayers are not entitled to the purported tax benefits of transactions described in these proposed regulations, taxpayers who have participated in those transactions should consider the best way to make corrections, whether by filing an amended return, an administrative adjustment request under section 6227, or a Form 3115, *Application for Change in Accounting Method* (whichever is applicable), or if the taxpayer has been contacted by the IRS for examination for a taxable year in which the taxpayer participated in the transaction, by working with an IRS employee to reverse the purported tax benefits.

In addition, the proposed regulations would subject material advisors to disclosure requirements with regard to transactions occurring in prior years. However,

notwithstanding §301.6111-3(b)(4)(i) and (iii), material advisors would be required to disclose only if they have made a tax statement on or after [the date that is 6 years before the date that Final Regulations are published in the **Federal Register**].

## V. Applicability Date

Proposed §1.6011-13(a) would identify monetized installment sale transactions, and transactions that are the same as, or substantially similar to, the monetized installment sale transactions described in proposed §1.6011-13(b) as listed transactions effective as of the date of publication in the *Federal Register* of a Treasury decision adopting these regulations as final regulations.

## **Special Analyses**

### I. Paperwork Reduction Act

The collection of information contained in these proposed regulations is reflected in the collection of information for Forms 8886 and 8918 that have been reviewed and approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act (44 U.S.C. 3507(c)) under control numbers 1545-1800 and 1545-0865.

To the extent there is a change in burden as a result of these regulations, the change in burden will be reflected in the updated burden estimates for the Forms 8886 and 8918. The requirement to maintain records to substantiate information on Forms 8886 and 8918 is already contained in the burden associated with the control number for the forms and remains unchanged.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

### II. Regulatory Flexibility Act

The Secretary of the Treasury hereby certifies that the proposed regulations will

not have a significant economic impact on a substantial number of small entities pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6). This certification is based on the fact that these proposed regulations implement sections 6111 and 6112 and §1.6011-4 by specifying the manner in which and time at which an identified Monetized Installment Sale Transaction must be reported.

Further, the Treasury Department and the IRS expect that the reporting burden is low; the information sought is necessary for regular annual return preparation and ordinary recordkeeping. The estimated burden for any taxpayer required to file Form 8886 is approximately 10 hours, 16 minutes for recordkeeping, 4 hours, 50 minutes for learning about the law or the form, and 6 hours, 25 minutes for preparing, copying, assembling, and sending the form to the IRS. According to the American Institute of CPAs 2016 National MAP Survey, the median billing cost for a CPA is approximately \$100 per hour. See 2016 AICPA PCPS/CPA.com National MAP Survey 8-9 (2016), [https://www.riscpa.org/writable/news-items/documents/2016\\_pcps\\_national\\_map\\_survey\\_commentary.pdf](https://www.riscpa.org/writable/news-items/documents/2016_pcps_national_map_survey_commentary.pdf) (last accessed July 3, 2023). For 2018, the median billing cost for a CPA is approximately \$210.50 per hour. See National MAP Survey 2018 Executive Summary, 13 (2018), <https://us.aicpa.org/content/dam/aicpa/interestareas/privatecompaniespracticesection/financialadminoperations/nationalmapsurvey/downloadabledocuments/2018-national-map-survey-executive-summary.pdf> (last accessed July 3, 2023). Thus, for the initial reporting period, it is estimated that taxpayers may incur costs ranging from \$2,150 to \$4,700 per respondent, although this amount is anticipated to be significantly less for all subsequent reporting periods.

For the reasons stated, a regulatory flexibility analysis under the Regulatory Flexibility Act is not required. The Treasury Department and the IRS invite comments on the impact of the proposed regulations on small entities. Pursuant to section 7805(f)

of the Code, this notice of proposed rulemaking has been submitted to the Chief Counsel for the Office of Advocacy of the Small Business Administration for comment on its impact on small business.

### III. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a State, local, or Tribal government, in the aggregate, or by the private sector, of \$100 million (updated annually for inflation). This proposed rule does not include any Federal mandate that may result in expenditures by State, local, or Tribal governments, or by the private sector in excess of that threshold.

### IV. Executive Order 13132: Federalism

Executive Order 13132 (Federalism) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on State and local governments, and is not required by statute, or preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive order. This proposed rule does not have federalism implications and does not impose substantial direct compliance costs on State and local governments or preempt State law within the meaning of the Executive order.

### V. Regulatory Planning and Review

Pursuant to the Memorandum of Agreement, *Review of Treasury Regulations under Executive Order 12866* (June 9, 2023), tax regulatory actions issued by the IRS are not subject to the requirements of section 6(b) of Executive Order 12866, as amended. Therefore, a regulatory impact assessment is not required.

### **Comments and Public Hearing**

Before these proposed amendments to the regulations are adopted as final

regulations, consideration will be given to any comments that are submitted timely to the IRS as prescribed in the preamble under the **ADDRESSES** section. The Treasury Department and the IRS request comments on all aspects of the proposed regulations. Any comments submitted will be made available at <https://www.regulations.gov> or upon request. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn.

A public hearing is being held on **October 12, 2023**, beginning at 10:00 a.m. ET, in the Auditorium at the Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. Participants may alternatively attend the public hearing by telephone.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit an outline of the topics to be discussed as well as the time to be devoted to each topic by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**. A period of ten minutes will be allocated to each person for making comments. After the deadline for receiving outlines has passed, the IRS will prepare an agenda containing the schedule of speakers. Copies of the agenda will be made available free of charge at the hearing. If no outlines of the topics to be discussed at the hearing are received by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**, the public hearing will be cancelled. If the public hearing is cancelled, a notice of cancellation of the public hearing will be published in the **Federal Register**.

Individuals who want to testify in person at the public hearing must send an email to [publichearings@irs.gov](mailto:publichearings@irs.gov) to have your name added to the building access list. The

subject line of the email must contain the regulation number REG-109348-22 and the language TESTIFY In Person.. For example, the subject line may say: Request to TESTIFY In Person at Hearing for REG-109348-22.

Individuals who want to testify by telephone at the public hearing must send an email to *publichearings@irs.gov* to receive the telephone number and access code for the hearing. The subject line of the email must contain the regulation number REG-109348-22 and the language TESTIFY Telephonically. For example, the subject line may say: Request to TESTIFY Telephonically at Hearing for REG-109348-22.

Individuals who want to attend the public hearing in person without testifying must also send an email to *publichearings@irs.gov* to have your name added to the building access list. The subject line of the email must contain the regulation number (REG-109348-22) and the language ATTEND In Person. For example, the subject line may say: Request to ATTEND Hearing In Person for REG-109348-22. Requests to attend the public hearing must be received by 5:00 p.m. ET on **October 10, 2023**.

Individuals who want to attend the public hearing telephonically without testifying must also send an email to *publichearings@irs.gov* to receive the telephone number and access code for the hearing. The subject line of the email must contain the regulation number (REG-109348-22) and the language ATTEND Hearing Telephonically. For example, the subject line may say: Request to ATTEND Hearing Telephonically for REG-109348-22. Requests to attend the public hearing must be received by 5:00 p.m. ET on **October 10, 2023**.

Hearings will be made accessible to people with disabilities. To request special assistance during the hearing, contact the Publications and Regulations Branch of the Office of Associate Chief Counsel (Procedure and Administration) by sending an email to *publichearings@irs.gov* (preferred) or by telephone at (202) 317-6901 (not a toll-free number) at least **October 6, 2023**.

## Statement of Availability of IRS Documents

Guidance cited in this preamble is published in the Internal Revenue Bulletin and is available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at <https://www.irs.gov>.

## Drafting Information

The principal author of these proposed regulations is Jonathan A. Dunlap, Office of Associate Chief Counsel (Income Tax & Accounting). However, other personnel from the Treasury Department and the IRS participated in their development.

## List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

## Proposed Amendments to the Regulations

Accordingly, the Treasury Department and the IRS propose to amend 26 CFR part 1 as follows:

### PART 1—INCOME TAXES

**Paragraph 1.** The authority citation for part 1 is amended by adding an entry for §1.6011-13 in numerical order to read in part as follows:

**Authority:** 26 U.S.C. 7805 \* \* \*

\* \* \* \* \*

Section 1.6011-13 also issued under 26 U.S.C. 6001 and 26 U.S.C. 6011.

\* \* \* \* \*

**Par. 2.** Section 1.6011-13 is added to read as follows:

#### **§1.6011-13 Monetized installment sale listed transaction.**

(a) *Identification as a listed transaction.* Transactions that are the same as, or substantially similar to, a transaction described in paragraph (b) of this section are identified as listed transactions for purposes of §1.6011-4(b)(2).

(b) *Monetized installment sale transaction.* A transaction is a *monetized*

*installment sale transaction* if, in connection with the transaction, and regardless of the order of the steps, or the presence of additional steps or parties--

(1) A taxpayer (seller), or a person acting on the seller's behalf, identifies a potential buyer for appreciated property (gain property), who is willing to purchase the gain property for cash or other property (buyer cash);

(2) The seller enters into an agreement to sell the gain property to a person other than the buyer (intermediary), in exchange for an installment obligation;

(3) The seller purportedly transfers the gain property to the intermediary, although the intermediary either never takes title to the gain property or takes title only briefly before transferring it to the buyer;

(4) The intermediary purportedly transfers the gain property to the buyer in a sale of the gain property in exchange for the buyer cash;

(5) The seller obtains a loan, the terms of which are such that the amount of the intermediary's purported interest payments on the installment obligation correspond to the amount of the seller's purported interest payments on the loan during the period. On each of the installment obligation and loan, only interest is due over identical periods, with balloon payments of all or a substantial portion of principal due at or near the end of the instruments' terms;

(6) The sales proceeds from the buyer received by the intermediary, reduced by certain fees (including an amount set aside to fund purported interest payments on the purported installment obligation), are provided to the purported lender to fund the purported loan to the seller or transferred to an escrow or investment account of which the purported lender is a beneficiary. The lender agrees to repay these amounts to the intermediary over the course of the term of the installment obligation; and

(7) On the seller's Federal income tax return for the taxable year of the purported installment sale, the seller treats the purported installment sale as an installment sale



under section 453.

(c) *Substantially similar transactions.* A transaction may be substantially similar to a transaction described in paragraph (b) of this section if the transaction does not include all of the elements described in that paragraph. For example, a transaction would be substantially similar to a monetized installment sale described in paragraph (b) of this section if a seller transfers property to an intermediary for an installment obligation, the intermediary simultaneously or after a brief period transfers the property to a previously identified buyer for cash or other property, and in connection with the transaction, the seller receives a loan for which the cash or property from the buyer serves indirectly as collateral.

(d) *Participation in a monetized installment sale transaction.* Participants in a monetized installment sale transaction described in paragraph (b) of this section include sellers, intermediaries and purported lenders described in paragraph (b) of this section and any other taxpayer whose Federal income tax return reflects tax consequences or the tax strategy described in paragraph (b) of this section or a substantially similar transaction. Buyers of gain property described in paragraph (b) of this section are not treated as participants.

(e) *Applicability date.* This section's identification of transactions that are the same as, or substantially similar to, the transaction described in paragraph (b) of this section as listed transactions for purposes of §1.6011-4(b)(2) and sections 6111 and 6112 of the Code is effective the date that these regulations are published as final regulations in the **Federal Register**. Notwithstanding section 301.6111-3(b)(4)(i) and (iii) of this chapter, material advisors are required to disclose only if they have made a tax statement on or after the date that is 6 years before the date that these regulations are published as final regulations in the **Federal Register**.

Douglas W. O'Donnell,

Deputy Commissioner for Services and Enforcement.

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